IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 23RD FEBRUARY 2007 / 4TH PHALGUNA 1928

RSA.No. 126 of 2007()

AS.24/2003 of DISTRICT COURT, KASARAGOD
OS.101/2000 of SUB COURT, HOSDRUG

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APPELLANT/DEFENDANT:

K.V. RAGHAVAN, AGED 57 YEARS,
S/O.KALYANI AMMA, HINDU, CONTRACTOR,
RESIDING NEAR DINESH BHAVAN,
CHERUVATHUR, CHERUVATHUR VILLAGE AND POST,
HOSDURG TALUK, KASARAGOD DISTRICT.

BY ADV. SRI.T.K.VIPINDAS

RESPONDENT:RESPONDENT/PLAINTIFF

V. NARAYANAN, AGED 64 YEARS,
S/O.KUNHAPPA, HINDU, CONTRACTOR,
RESIDING NEAR DINESH BHAVAN,
CHERUVATHUR, CHERUVATHUR VILLAGE,
HOSDURG TALUK, KASARAGOD DISTRICT.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 23/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A. No.225/07 IN R.S.A.No.126/07

23.2.07 DISMISSED Sd/- M.SASIDHARAN NAMBIAR
JUDGE

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.126 OF 2007

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Dated this the 23rd day of February, 2007

JUDGMENT

Defendant in O.S.101/00 on the file of Sub Court, Hosdurg is the appellant. Plaintiff is the respondent. Respondent instituted the suit for realisation of Rs.1,30,521/- due to him from appellant. It was contended by respondent that the appellant and respondent were jointly undertaking construction works and the account was settled in July 1998 and at the time of settlement on 18.7.98 evidenced by Ext.A1(a) in the account book maintained by respondent and Ext.B1(a) note book maintained by appellant, the amount due to respondent was fixed at Rs.1,74,521/-. On that day appellant paid Rs.44,000/- and the balance of Rs.1.30,521/- payable, was agreed to be paid in two instalments namely Rs.42,000/- on or before 30.8.98 and the balance of Rs.88,521/- on or before 30.11.1998. According to respondent, appellant

protracted the payment by one reason or other and finally towards repayment of the amount appellant issued Ext.A2 cheque drawn in his account maintained in Cheruvathur Farmers' Service Co-operative Bank Ltd and when respondent presented it through his account in Kasargod District Co-operative Bank Evening Branch, it was dishonoured for want of sufficient funds and inspite of Ext.A3 notice demanding the amount it was not paid and respondent is therefore entitled to the amount with interest. Appellant filed a written statement contending that there was no joint undertaking of construction work and appellant had only borrowed amount from respondent and the account was finally settled on 18.7.98 in the presence of DW3, Kunhambu Master, DW2, Kamalakshan and V. Kunhikrishnan and Rs.1,30,521/- was the balance amount fixed after deducting Rs.44,000/- paid on that day and out of the balance amount Rs.1,04,000/- was paid on 20.7.98 from the residence of DW3, in the presence of DW2 and Kunhikrishnan and respondent received that amount and only the balance of Rs.26,521/- is due and respondent orally agreed that it could be

paid by the end of December, 1998 and appellant is ready and willing to pay that amount and respondent is not entitled to the decree sought for. Learned Sub Judge framed the necessary issues. On the side of respondent, he was examined as PW1. On the side of appellant Dws. 1 to 4 were examined, Exts.A1 to A3 and Exts.B1 to B3 were also marked. Learned Sub Judge on appreciation of evidence found that discharge of Rs.1,04,000/- pleaded by appellant was not established and therefore granted a decree as prayed for. Appellant challenged the decree and judgment before District Court, Kasaragod. Learned District Judge on reappreciation of evidence, confirmed the findings of the learned Sub Judge and dismissed the appeal. This Second Appeal is filed challenging the concurrent decree.

2. Learned counsel appearing for appellant was heard.

3. The argument of learned counsel appearing for appellant was that courts below did not appreciate the evidence in the proper perspective and when the appellant did not examine Kunhikrishnan, who according to respondent was the

mediator on his side, courts below should have drawn an adverse inference against respondent and in any event rejection of the application filed by appellant for examination of Kunhikrishnan is illegal as evidence of Kunhikrishnan would have established the payment and therefore the decree and judgment are to be set aside.

4. Though appellant disputed that there was no joint construction work undertaken by appellant and respondent and the amount settled as due under Ext.A1(a) and Ext.B1(a) endorsements was the amount due which was borrowed by appellant from respondent, evidence establish that there was joint undertaking of the construction work and it was not a simple money lending transaction . Exts. A1(a) and B1(a) entries establish that when the amount due under the transaction was settled on 18.7.98 and Rs.1,74,521/- was fixed as the amount due and Rs.44,000/- was paid, both appellant respondent and the mediators signed both in Ext.A1 account book maintained by respondent and Ext.B1 note book maintained by appellant, after recording Ext.B1(a) and Ext.A1(a) settlement. The fact that

Rs.44,000/- was paid out of Rs.1,74,521/- due and the balance of Rs.1,30,521/- was agreed to be paid in two instalments on or before the respective dates shown therein is admitted and recorded in Ext.A1(a) and Ext.B1(a). Respondent is seeking a decree for realisation of the said amount. According to appellant, part of the amount was repaid on 20.7.98 at the house of DW3. Learned Sub Judge and learned District Judge on appreciation of evidence, disbelieved the plea of discharge. The question is whether in exercise of the powers of this court under section 100 of C.P.C that finding of fact can be interefered with?

5. As rightly found by the courts below when there was a statement of accounts and it was reduced into writing and entered in the account books maintained by appellant as well as the respondents, under both Ext.A1(a) entry where and Ext.B1(a) entry where not only appellant and respondent but also the mediators signed, in the ordinary human conduct, payments if any towards that settlement will be reduced to writing and signed by parties.

6. Eventhough appellant contended that DW3 was present at the time of mediation, he did not sign in Ext.A1(a) or Ext.B1(a) which fortifies the case of the respondent that he was not present at the time of mediation.

7. When the accounts were settled and in token of the settlement both the appellant and respondent as well as mediators affixed their signatures, if a portion of the amount due to respondent was paid on a later date, one would naturally expect an acknowledgement by appellant and respondent and the mediators. Admittedly, no such entries are there in Ext.A1 account book maintained by respondent. Appellant is relying on entries in Ext.B1 to prove the discharge. In the said entries in Ext.B1, respondent did not sign. If Rs.1,04,000/- was paid as claimed by appellant or deposed by Dws 2 and 3 the signature of respondent would have definitely been obtained. Even if the case that Ext.A1 was not available at that time as the alleged payment was from the house of DW3 is true no acceptable reason has been shown why the signature of respondent was not obtained in Ext.B1 in token of

receipt of Rs.1,04,000/- as claimed by respondent. It is more so, when appellant deposed that he had demanded receipt for that amount and respondent was not prepared to pass receipt. Naturally when the amount was fixed and an acknowledgement was obtained in the books maintained by both respondent and appellant when towards the balance so fixed, Rs.1,04,000/- was paid on a latter date, in all human probability appellant would have obtained either an acknowledgement in the account book or would have obtained a receipt from respondent. If the appellant demanded a receipt and respondent did not pass the receipt, it is more so the reason why an acknowledgement in Ext.B1 account book would have been demanded and made.

8.The entry relating to the discharge in Ext.B1 was seen erased and added. The court below appreciated the evidence and found that no reliance could be placed on them. I find no reason to interfere with that finding also. Though DW3 deposed that he paid that amount after encashing a bill to the appellant and at the instance of appellant DW3 paid that amount to the respondent,

there would be records to prove that DW3 had encashed that bill. No such evidence was adduced. In such circumstance, I cannot agree with the submissions of the learned counsel appearing for appellant that an opportunity should have been granted to examine the other mediator Kunhikrishnan. In the light of the evidence on record and the improbability of the case pleaded by appellant and the infirmity of the evidence, I find no reason to interfere with the decree granted by courts below on the ground of denial of opportunity to examine Kunhikrishnan. No substantial question of law arises for consideration.

Appeal is dismissed inlimine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006